

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN WILSON,

Defendant-Appellant.

UNPUBLISHED

August 21, 2007

No. 267945

Kent Circuit Court

LC No. 04-012450-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DEMOND ANDERSON,

Defendant-Appellant.

No. 268491

Kent Circuit Court

LC No. 04-011522-FC

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right their jury trial convictions arising out of events occurring on July 20, 2004. More specifically, in docket number 267945, defendant Shawn Wilson appeals his convictions for four counts of first-degree criminal sexual conduct, MCL 750.520b; one count of conspiracy to commit first-degree criminal sexual conduct, MCL 750.520b; one count of armed robbery, MCL 750.529; one count of conspiracy to commit armed robbery, MCL 750.529; one count of first-degree home invasion, MCL 750.110a(2); and one count of conspiracy to commit first-degree home invasion, MCL 750.110a(2). In docket number 268491, defendant Eric Anderson appeals his convictions for three counts of first-degree criminal sexual conduct, MCL 750.520b; one count of conspiracy to commit first-degree criminal sexual conduct, MCL 750.520b(1)(d); two counts of assault with a dangerous weapon, MCL 750.82; one count of first-degree home invasion, MCL 750.110a(2); one count of armed robbery, MCL 750.529; one count of conspiracy to commit armed robbery,

MCL 750.529; and one count of possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

In docket no. 267945, defendant Wilson first argues that he was denied the effective assistance of counsel by his trial counsel's failure to seek suppression of one of the victim's in-court identification of him as a perpetrator. To establish a claim of ineffective assistance of counsel, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of defendant's trial would have been different, and (3) the resulting trial was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel is not ineffective for "failing 'to advocate a meritless position.'" *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), quoting *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Wilson argues that the victim's in-court identification should have been excluded because it was tainted by an improperly suggestive pretrial identification procedure, and that his trial counsel was ineffective for failing to move to exclude it. Generally, the decision to move to suppress an in-court identification is a matter of trial strategy, which we will not invalidate in hindsight. *People v Carr*, 141 Mich App 442, 452; 367 NW2d 407 (1985). An identification procedure is evaluated in light of the totality of the circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial probability of misidentification. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). On the record before us, we do not conclude that the prior photographic and corporeal lineups were unduly suggestive. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). Even were we to conclude that the victim's in-court identification of Wilson was tainted, however, we would still conclude that that identification was not improper because the victim provided an independent basis for it during her testimony. *Colon, supra*. The victim testified that she remembered Wilson's and Anderson's faces from an encounter with them on the porch; she was positive of her in-court identification; and she had approximately 1-1/2 to 2 hours to observe Wilson in close proximity during the crimes. Therefore, because the in-court identification was not improper, Wilson cannot demonstrate that his counsel's failure to move to suppress it fell below an objective standard of reasonableness. *Mack, supra* at 130.

Further, Wilson cannot show that, but for his trial counsel's decision not to challenge the in-court identification, the outcome of the trial would have been different. At trial, both victims identified Wilson as one of the perpetrators. While one victim failed to identify Wilson in pretrial lineups, the other victim selected both Wilson and Anderson "without hesitation." Thus, defendant is not entitled to relief on this claim of ineffective assistance of counsel.

Next, Wilson argues that his trial counsel was ineffective for failing to move to quash the "robbery related counts" at the preliminary examination. While Wilson correctly points out that the victims of these offenses did not testify at his preliminary examination, any error in the bind over was necessarily vitiated by the presentation of sufficient evidence to support Wilson's convictions for these offenses at trial. *People v Hall*, 435 Mich 599, 605; 460 NW2d 520 (1990);

People v Dunham, 220 Mich App 268, 276-277; 559 NW2d 360 (1996). Accordingly, Wilson's argument is without merit.

Wilson also argues that his trial counsel was ineffective for failing to move for the removal of Juror #14. Generally, the failure to challenge a juror is not a basis to claim ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). That decision is a matter of trial strategy, and this Court does not evaluate the decision in hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). This Court assumes that jurors are competent and impartial, and the burden of proving otherwise is on the party seeking a particular juror's disqualification. *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987).

During voir dire, Juror #14 stated that she did not know the victims, but later, during trial, the juror advised the court that one of the victims participated briefly in Juror #14's after-school volunteering program. When the juror informed the trial court of her previous involvement with this victim, defendant Anderson moved to dismiss her. Counsel for Wilson took no position in this regard. During questioning by the trial court, juror #14 denied that her past experience with this victim would influence her judgment about the case and affirmatively stated that she could be fair and impartial. When information potentially affecting a juror's ability to act impartially is discovered after the swearing of the jury, a defendant is entitled to relief only if he can show that he was prejudiced by the juror's presence and that the juror should have been removed for cause. *People v Daoust*, 228 Mich App 1, 8-9; 577 NW2d 179 (1998). And, when a juror with knowledge of a party or a witness swears that he or she can render an impartial verdict, the juror should not be removed for cause. *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986). Therefore, because it would have been futile for Wilson to try to remove Juror #14, Wilson was not denied the effective assistance of counsel by his counsel's failure to join with Anderson's counsel in seeking the juror's removal. *Mack, supra* at 130; *Thomas, supra* at 457.

Finally, Wilson argues, in propria persona, that his trial counsel was ineffective for failing to request a DNA expert. Trial counsel will be deemed ineffective for failing to obtain or call an expert witness only where a defendant can show that he was deprived of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Wilson has not demonstrated on appeal that the failure to enlist the aid of a DNA expert deprived him of a substantial defense. Wilson was able to, and did in fact, defend against the prosecutor's charges by arguing that no physical evidence tied him to the scene of the crime. The prosecutor's case was based upon the eyewitness identification of defendants by the female victims. In fact, at trial, the prosecutor's forensic experts testified that the DNA material present on a green glove and on two condoms found at the scene was sufficient to perform an "exclusion" test, which showed that the DNA material was not provided by Wilson. Thus, the DNA evidence presented at trial did not implicate defendant, but instead tended to support his argument that he was not one of the perpetrators of the instant crimes. Nevertheless, Wilson speculates on appeal that the use of the mitochondrial DNA technique would have possibly allowed a forensic examiner to find sufficient DNA on items found at the scene to exonerate him. However, this assertion is without consequence, because the prosecutor's experts testified, and the prosecutor acknowledged, at trial that there was no DNA evidence linking Wilson to the scene of the crime. Therefore, Wilson was not deprived of a substantial defense by his counsel's decision not to obtain his own expert, presumably to also testify that DNA at the scene was not Wilson's.

Wilson's trial attorney's decision not to enlist the assistance of DNA expert under these circumstances was trial strategy, which this Court refrains from second-guessing with the benefit of hindsight. *Id.* at 398; *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

In addition, Wilson fails to show that without his trial counsel's alleged error the outcome of the trial would have been different. Both female victims identified Wilson as one of the assailants. One of the female victims also identified Wilson in a photographic lineup. The lack of physical evidence tying Wilson to the scene of the crime was well established at trial. Wilson has not established that testimony from his own DNA expert reiterating that such was the case would have further undermined the identifications by the victims of Wilson as one of the assailants. Therefore, even absent counsel's alleged error, defendant has not shown that the outcome of trial would have been different. *Toma, supra* at 302.

In docket no. 268491, defendant Anderson argues that there was insufficient evidence presented at trial for a rational jury to find him guilty of the charged crimes. Specifically, he challenges the evidence proving his identity as one of the perpetrators. This Court reviews de novo claims of insufficient evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In so doing, this Court views the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could have found the elements of the charged offenses beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

In all cases, the identity of a defendant as the perpetrator of the crime must be proven by the prosecution beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). At trial, both of the female victims identified Anderson as one of the assailants who sexually assaulted them on the night in question. Furthermore, roughly one month after the incident, one of the female victims identified Anderson in a photographic lineup. While Anderson presented evidence that called into question the ability of the victims to identify him, the jury was allowed to base its conviction upon the testimony of the victims at trial. MCL 750.520h; *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994). Moreover, issues of credibility are left to the trier of fact. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998). On the record, the evidence identifying Anderson as one of the perpetrators of the crimes for which he was convicted was legally sufficient to support his convictions.

We affirm.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen